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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

No. 80-6366

WILLIE LLOYD TURNER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Brief In Opposition On Behalf Of The Commonwealth

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT AGAINST GRANTING CERTIORARI	4
CONCLUSION	13
CERTIFICATE OF SERVICE	13

TABLE OF CITATIONS

Cases

	PAGE
Briley v. Commonwealth, 221 Va.____, 273 S.E.2d 48 (1980)	11
Cardinale v. Louisiana, 394 U.S. 437 (1969) . . .	12
Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049 (1980)	11
Edelman v. California, 344 U.S. 357 (1953)	11, 12
Frith v. State, 325 N.E.2d 186 (Ind. 1975)	7
Godfrey v. Georgia, ____U.S.___, 64 L.Ed.2d 398 (1980)	7, 8, 9, 10, 12
Gregg v. Georgia, 428 U.S. 153 (1976)	12
Hamling v. United States, 418 U.S. 87 (1974) . . .	6
Ham v. South Carolina, 409 U.S. 524 (1973) . . .	6
Ristaino v. Ross, 424 U.S. 589 (1976)	6
Rowbotham v. State, 542 P.2d 610 (Okla. Crim. App. 1975), modified on other grounds, 428 U.S. 907 (1976)	7
Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135, cert. denied, 441 U.S. 967 (1979)	5, 10, 11
Smith v. State, 236 Ga. 12, 222 S.E.2d 308, (Ga.), cert. denied, 428 U.S. 910 (1976) . . .	7
State v. Simmons, 286 N.C. 681, 213 S.E.2d 280, 286 (1975)	7
State v. Wilson, 57 N.J. 39, 269 A.2d 153 (1970)	7
State v. Wilson, 30 Ohio St.2d 199, 283 N.E.2d 632 (1972)	7
Turner v. Commonwealth, 221 Va.____, 273 S.E.2d 36 (1980)	1, 8, 9, 11, 12
United States v. Johnston, 268 U.S. 220 (1925) . .	5
Witherspoon v. Illinois, 391 U.S. 510 (1968) . . .	2, 4, 5, 6

Other Authorities

28 U.S.C. § 1257(3) 1

§ 17-110.1(C) of the Code of Virginia (1950), as amended 11

§ 18.2-31(d) of the Code of Virginia (1950), as amended 3, 11

§ 19.2-264.2 of the Code of Virginia (1950), as amended 2, 11

§ 19.2-264.4 of the Code of Virginia (1950), as amended 2, 7, 8, 9

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RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 221 Va. ____, 273 S.E.2d 36 (1980).

JURISDICTION

The petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Whether The Trial Court's Exclusion Of Venireman Samuel Cypress For Cause Violated This Court's Holding In Witherspoon v. Illinois, 391 U.S. 510 (1968), Thus Denying Him His Right To A Trial By A Fair And Impartial Jury In Violation Of The Sixth And Fourteenth Amendments To The Constitution Of The United States?

II. Whether §§ 19.2-264.2 And 19.2-264.4 Of The Code Of Virginia (1950), As Amended, Were Unconstitutionally Applied To The Actions Of Petitioner In Violation Of The Eighth And Fourteenth Amendments To The Constitution Of The United States?

STATEMENT OF THE CASE

On July 12, 1978, petitioner entered Smith Jewelers located in Franklin, Virginia at about 11:20 a.m. Using a sawed-off shotgun that had been wrapped in a green towel, petitioner silently motioned the various customers and employees to line up against the counter of one side of the store and forced the proprietor, W. Jack Smith, Jr., to stuff money from the cash register into some jewelry bags. (App. 149). While doing so, Smith was able to activate a silent alarm. Subsequently, a local police officer, A. D. Bain, Jr., came in and inquired as to why the alarm was on. (App. 153). Petitioner then forced Bain to give up his revolver to him, who picked it up while continuing to hold his shotgun in his right hand. Petitioner made the store owner turn the alarm off and fill up some more jewelry bags with store merchandise. (App. 155).

Petitioner then took the pistol from his pocket and put it in his right hand, switching the shotgun to his left hand. As he tossed the pistol, it discharged and a shot went towards

the back of the store. After Bain assured petitioner that no one was coming in the back, petitioner went to the middle of the room, "just looked at Mr. Smith and fired the [pistol] at" him, causing him to "yell like a puppy and [fall] to the floor . . .." (App. 156-57, 182). Medical testimony established that this first shot to Smith, while not the cause of his death, did produce injuries to his head and brain. (App. 230). Bain testified that petitioner had fired the shot at Smith from a distance of 12 to 15 feet and had "just pointed right at [him] and fired" without warning. (App. 242). At this point, Bain tried to reason with petitioner, who responded by saying: "I'm going to kill that nigger for squealing on me." (App. 161, 242-43). Petitioner then reached over the counter, looked down at the "gurgling" Smith, and shot him two times in the chest in a "rapid fire" manner. (App. 162). Bain was then able to subdue petitioner. Medical testimony demonstrated that each of these two shots would have been independently fatal. (App. 227-33).

On December 4, 1979, the petitioner was convicted by a jury of capital murder in the commission of a robbery in violation of § 18.2-31(d) of the Code of Virginia (1950), as amended. At the penalty stage of petitioner's trial, evidence was introduced that between September, 1970 and the date of petitioner's trial, he had incurred five felony convictions, all but one involving acts of violence. One was for second degree murder. Bain testified that petitioner did not appear

nervous while the robbery was in progress. App. 377). Petitioner's hands were not shaking when he fired the two shots to Smith's chest; he looked right over the counter rather than to see if anyone else was entering the store. (App. 379). Finally, a police officer testified that after petitioner had been subdued by Bain and was being handcuffed, he remarked, "I guess I'm on the way back." (App. 351). Subsequently, the jury recommended a sentence of death on December 6, 1979. The trial court then ordered a post-sentence report to be prepared and on February 6, 1980, the court affirmed the jury's recommendation, finding that the sentence was appropriate. Petitioner then appealed his conviction to the Supreme Court of Virginia, which accorded his case a priority status. On November 26, 1980, the Supreme Court of Virginia affirmed petitioner's conviction and held that the penalty imposed was neither excessive nor disproportionate.

ARGUMENT AGAINST GRANTING CERTIORARI

I. THE EXCLUSION FOR CAUSE OF VENIREMAN SAMUEL CYPRESS WAS CONSISTENT WITH THIS COURT'S HOLDING IN WITHERSPOON V. ILLINOIS.

Petitioner alleges that the exclusion of venireman Samuel Cypress for cause was done in contravention of this Court's holding in Witherspoon v. Illinois, supra, since his answers on voir dire did not clearly establish his absolute refusal to consider the imposition of a sentence of death regardless of the facts adduced in petitioner's trial.

Respondent submits that the Supreme Court of Virginia correctly applied Witherspoon in the case at bar. In Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135, cert. denied, 441 U.S. 967 (1979), the state Supreme Court found that the exclusion of a prospective juror in a capital punishment case is a mixed question of law and fact. In order to apply the rule of law that a venireman may be excluded for cause only if he is irrevocably committed against capital punishment, the trial court must first resolve the factual question. As a fact finder, the trial judge must weigh the meaning of the answers given in light of the phrasing of the questions posed, the inflections, tone and tenor of the dialogue, and the general demeanor of the prospective juror. 219 Va. at 464-65. A trial court that witnesses or conducts such an examination is clearly in a much better position to resolve this factual question than an appellate court, which has only a cold record upon which to make such a determination.

On appeal, the Supreme Court of Virginia upheld the trial court's conclusion that the responses of Cypress on voir dire demonstrated that he was irrevocably committed against the death penalty. Respondent would argue that the present contention regarding Cypress is essentially a factual allegation and in no way presents a previously undecided question of law. Thus, respondent submits that this is not the kind of question that would justify the granting of certiorari. See United States v. Johnston, 268 U.S 220 (1925).

Furthermore, on the merits of the exclusion of Cypress, the decision of the trial court that his responses, when considered in toto, showed his absolute aversion to the death penalty was fully justified. Petitioner complains of the way certain questions were phrased to Cypress by the trial court. For example, he alleges that the question: "Is your objection to the death penalty absolute?" was overly vague. Respondent submits that this question was reasonably designed to elicit from Cypress his attitudes regarding the imposition of capital punishment. In this regard, it must be remembered that this Court has often recognized that a trial court has wide discretion on voir dire, both in terms of its manner and its substance. A trial court is under no obligation to conduct a Witherspoon-related examination in any particular way. See generally Ristaino v. Ross, 424 U.S. 589 (1976); Hamling v. United States, 418 U.S 87 (1974); Ham v. South Carolina, 409 U.S 524 (1973).

Similarly, petitioner alleges that Cypress did not explicitly state his absolute refusal to consider the death penalty as a sentencing option. Respondent would contend that the juror's responses, when viewed in context, clearly demonstrated that he should be excluded for cause. Petitioner's tortured interpretation of Cypress' responses to the contrary, he can point to no answer on voir dire which in any way evinced a willingness on the part of the venireman to consider the imposition of death in petitioner's trial. When petitioner alleges

that certain responses manifested the juror's ambivalent attitude, he confuses lack of precision with ambivalence. When, asked if he could "in a proper case" impose the death penalty, he stated that he could not see "where it helps any," this can only be taken to mean an answer in the negative. While Cypress' answers may not have been "models of clarity," the Supreme Court of Virginia's conclusion that he was properly excluded is consistent with the approach of other state courts which undertake "a contextual consideration of the entire voir dire examination . . .." State v. Simmons, 286 N.C. 681, 213 S.E.2d 280, 286 (1975), modified on other grounds, 428 U.S 903 (1976). See also Rowbotham v. State, 542 P.2d 610 (Okla. Crim. App. 1975), modified on other grounds, 428 U.S. 907 (1976); Frith v. State, 325 N.E.2d 186 (Ind. 1975); Smith v. State, 236 Ga. 12, 222 S.E.2d 308, (Ga.), cert. denied, 428 U.S 910 (1976); State v. Wilson, 30 Ohio St.2d 199, 283 N.E.2d 632 (1972); State v. Wilson, 57 N.J. 39, 269 A.2d 153 (1970).

II. PETITIONER'S SENTENCE PURSUANT TO SECTION 19.2-264.4 OF THE CODE OF VIRGINIA WAS CONSISTENT WITH THIS COURT'S HOLDING IN GODFREY V. GEORGIA, ___U.S.___, 64 L.Ed.2d 398 (1980), AND WAS NOT A VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

On the basis of this Court's recent decision in Godfrey v. Georgia, supra, petitioner argues that his sentence is unconstitutional. He first appears to argue that the facts adduced in the case at bar were no more aggravated than those in Godfrey, thus invalidating the jury's finding "that his

conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." See § 19.2-264.4(C).

In response, respondent would argue that this again is essentially a factual argument respecting the proper application of a prior decision of this Court. As indicated in respondent's first argument, this is not an adequate ground for the granting of certiorari by this Court. Furthermore, as to the merits of this contention, respondent says that the facts in petitioner's case were much more egregious than those in Godfrey. As stated by the Supreme Court of Virginia, "Godfrey rested upon its unique facts." Turner v. Commonwealth, 273 S.E.2d at 44. Godfrey involved a Georgia statute substantively identical to Virginia's "vileness" aggravating circumstance. This Court considered whether "in light of the facts and circumstances of the murders that Godfrey was convicted of committing," the Georgia Supreme Court could constitutionally apply that state's own vileness provision so as to uphold the death penalty imposed. See ____U.S.____, 64 L.Ed.2d at 409. The defendant in Godfrey, who was suffering from severe marital difficulties, after having a heated argument with his wife over the telephone went to the trailer home where she was staying with her mother and daughter. There, he shot and killed instantly his wife and mother-in-law. At trial, the prosecutor conceded the absence of "torture" or "aggravated battery," thus leaving only "depravity of mind" as a remaining possibility. The trial

judge stated that there had been no physical harm or torture beyond the actual murders. He also found as a mitigating factor defendant's prior history of no significant criminal activity.

Respondent would argue that the Supreme Court of Virginia was thoroughly justified in determining that the facts in petitioner's case were sufficiently distinguishable to permit a conclusion that petitioner's conduct was "outrageously or wantonly vile, horrible or inhuman" and that he had committed an "aggravated battery." 273 S.E.2d at 45. First, unlike the defendant in Godfrey, who had no prior criminal record, petitioner's sentence rested on both of § 19.2-264.4(C)'s aggravating factors. He had an extensive and violent criminal history. Petitioner manifested much greater cold-bloodedness, brutality, and callousness than the defendant in Godfrey. Smith was shot and killed solely because he had activated the silent alarm, and not, for example, so that petitioner could effect his escape. The first shot was fired without warning. After a significant amount of time had elapsed, petitioner strode over to the counter, leaned over, and fired two bullets into the prone, helpless body of Smith. As Smith was slumped behind the counter, one customer heard him "gurgling." 273 S.E.2d at 45. Unlike the victims in Godfrey, Smith did not die instantaneously from a single discharge of a firearm, but rather he suffered a slow, painful death from at least three shots. Thus, the record establishes quite clearly

that petitioner's conduct was much more aggravated than that in Godfrey and shows that he had in fact committed an aggravated battery, which is defined in Virginia as a "battery which, qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder." See Smith v. Commonwealth, supra, 219 Va. at 478.

Respondent would note that petitioner continues in this Court his erroneous, unsubstantiated characterization of petitioner as a would-be criminal who panicked when his robbery went awry. On the contrary, the evidence introduced at trial was that petitioner at no time appeared nervous and shot Smith in a deliberate, calculated fashion. (App. 377-79). There is absolutely no evidence supporting any insinuation that petitioner's state of mind at the time he killed Smith was remotely comparable to that of the defendant in Godfrey when he killed his family members.

Thus, respondent would argue that the facts in the case at bar were so egregious as "to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, supra, 64 L.Ed.2d at 409. The Supreme Court of Virginia quite properly upheld petitioner's sentence. Although the Georgia Supreme Court may have deviated from its past decisions in Godfrey, nothing of the sort occurred in the case at hand. The Virginia Supreme Court correctly determined that the evidence established that petitioner had committed an aggravated battery, as defined in

Smith v. Commonwealth, supra. Further, the Court conducted a review of petitioner's sentence on appeal in order to determine that it was not excessive or disproportionate to other cases prosecuted under § 18.2-31(d) and thus prevented the "standardless and unchanneled imposition of" a death sentence. In Turner, the Supreme Court of Virginia noted that petitioner's past criminal record was "one of the most extensive we have reviewed under Code Section 17-110.1(C)." 273 S.E.2d at 47. Only one other such defendant had previously been convicted of a murder. The state court also noted that while petitioner's murder had not risen to the level of atrociousness of several past decisions, it was just as brutal as the murders in Briley v. Commonwealth, 221 Va.____, 273 S.E.2d 48 (1980), and Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049 (1980).

In this regard, petitioner makes several arguments regarding the proper construction of § 19.2-264.2 on the basis of several Georgia decisions which supposedly have been incorporated into the comparable Virginia vileness provision. However, no such "incorporation" argument was presented to the Supreme Court of Virginia; therefore, this argument is not presently cognizable. This Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in the courts with the requirements of state law. See Edelman v. California,

344 U.S. 357 (1953). State courts should be given the first opportunity to consider the applicability of state statutes in light of constitutional challenges. See Cardinale v. Louisiana, 394 U.S. 437 (1969).

Finally, petitioner argues that his sentence was the result of "the uncontrolled discretion of a basically uninstructed jury." Godfrey v. Georgia, supra, 64 L.Ed.2d at 407. He argues that the jury was not given sufficient instructions regarding the term "aggravated battery" to enable it to construe said term in a constitutional manner. In Gregg v. Georgia, 428 U.S. 153 (1976), this Court stated with respect to Georgia's vileness statute: "[T]here is no reason to think the juries will not be able to understand it." Id. at 202 n.54. In any event, the term "aggravated battery", the factor which was found by the Supreme Court of Virginia to be shown by the evidence in Turner, was given further specificity in an instruction to the jury. Consistent with the state Supreme Court's previous limiting construction of this term, the jury was instructed that the aggravated battery had to be "beyond the minimum necessary to accomplish the act of murder." (App. 40). The jury's verdict similarly employed this language. (App. 5). Thus, respondent submits that the decision of the jury in the case at bar was done in adherence to specific instructions which insured that the jury would act in a constitutional way.

CONCLUSION

For the reasons presented, the respondent respectfully contends that the issues raised in this case are neither important nor substantial and that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

Robert H. Anderson III

ROBERT H. ANDERSON, III
Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that I, Robert H. Anderson, III, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and on the 17th day of April, 1981, I mailed, with first class postage prepaid, a copy of the Respondent's Brief in Opposition to Granting of Writ of Certiorari to John C. Lowe, Esquire, Lowe, Gordon, Jacobs, & Redinger, Ltd., 409 Park Street, Charlottesville, Virginia 22901, counsel for petitioner.

Robert H. Anderson III

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